Supreme Court
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No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 2001

KENNETH PILIPSHEN,

Petitioner,

-v.-

IBM CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a Title VII case, is it enough for the Plaintiff [Petitioner], to avoid a grant of summary judgment against him, to show a *prima facie* case and evidence of pretext (in the absence of unusual circumstances that would prevent a rational fact-finder from concluding that the employer's reasons were discriminatory and in violation of Title VII) - - as held by the Fifth, Fourth and Eleventh Circuits - - , or is evidence of a *prima facie* case plus pretext insufficient in and of itself to permit a jury finding of discrimination without something more, as held by the Second Circuit?

2. Does the requirement of being on an executive replacement table (and/or in an active executive resource plan) as a prerequisite to corporate advancement violate Title VII, especially when, as an adjunct to such table or plan, the employer also takes into account the closeness of the employee to the (noncompulsory) retirement age of 55, the proposed longevity of the employee, and also makes inquiry about the employee's age?

3. Are the shifting burdens of production and proof enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) applicable to summary judgment cases?

4. In 1995, when Petitioner was 52 years old, he and the other oldest and most experienced tax director of IBM were demoted from executive positions. IBM admitted that Petitioner presented a *prima facie* case of age discrimination. There was no uncontroverted independent evidence to show that no discrimination had occurred. Did the Second Circuit commit error, in affirming the grant of summary judgment to IBM, based on the district court's findings that each of certain particular acts, in and of itself, was not enough to constitute age discrimination, without considering whether the totality of all the Petitioner's evidence was enough to withstand summary judgment, and without considering all relevant factors,

including but not limited to failure to consider

a) evidence that the person in charge of Petitioner's possible advancement had falsely advised other executives of the employer that Petitioner had made a five year commitment (until the year 2000) to be abroad, which thus rendered him ineligible as a replacement for any executive position, though Petitioner had contracted to be abroad only for three years;

b) Petitioner had been removed from executive resource tables and replacement tables, preventing him from thereafter being considered for an executive position;

c) his request for an internal grievance inquiry into his demotion on the ground of age was never honored by the employer, who instead (to use the employer's own words) became "pissed off" at the demand for inquiry, and at the serious charge of discrimination;

d) the employer then gave him the only unfavorable rating that he ever had, though all his peers gave him enthusiastic ratings;

e) all with the result that he was denied stock options, advancement, and was never ever even considered again for executive openings in his area of expertise (international taxes) that became available in 1998 and 1999, though younger persons - - without such experience or expertise - - were considered, and hired, and though he clearly met the criteria for hiring; and

f) that the person in control of Petitioner's advancement had finally been fired by the employer as not being wholly trustworthy, such person being the one upon whom IBM mainly relied for its defense?

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The District Court opinion (per Brieant, J.) granting Respondent's summary judgment motion (Petitioner's Appendix pp. A1-A12) is not published. The Court of Appeals decided the appeal by summary order (Petitioner's Appendix pp. A14 to A15), not published in the Federal Reporter.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on July 24, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C.§ 1254 (1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 (1) (b)- (d) and parallel provisions of New York State law, relevant to this petition are reprinted in the Appendix at pp. A21-A23.

STATEMENT OF THE CASE

Petitioner, formerly an executive at IBM Corp., Respondent, ("IBM"), claimed that he was discriminated against because of his age (52) by being demoted from his executive position, along with another person, - - the two being the oldest executives in his department (taxation) - - , in favor of younger persons, and never advanced again to an executive position, though purportedly the original demotion was because of executive retrenchment - -, his superior having knowingly falsely advised others who might have promoted Petitioner back to an executive position, that he had made a five year commitment (until the year 2000) to be abroad, and that this had rendered him ineligible as a replacement for any executive position. In truth, as his superior well knew, he had contracted to be abroad for only three years. Petitioner further contended that he had been removed from executive resource tables and replacement tables in such a way as to prevent him from thereafter being considered for an executive position.

Writing its opinion one day after this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and without any reference thereto, the District Court, relying almost entirely on the defense offered by the IBM executive who had knowingly falsified the information as to Petitioner's availability, and noting that IBM does "*** not contest that Plaintiff has shown a *prima facie* case of age discrimination," nonetheless granted IBM's summary judgment motion. It nowhere considered the totality of Petitioner's evidence, instead isolating (and often ignoring) each evidentiary facet of Petitioner's case, and finding each and every such facet to be insufficient proof, in and of itself. The Second Circuit affirmed, "For substantially the reasons stated by" the District Court, in a Summary Order (App. C, pp. A14-A15).

Though the Fourth, Fifth and Eleventh Circuits have ruled that *Reeves*, *supra*, laid out the "permissive pretext standard" - - that if the plaintiff establishes that the employer's reasons are pretextual, the trier of fact is permitted, but not required, to enter judgment for the plaintiff - -, the Second Circuit uses the "pretext plus" standard, requiring not only a *prima facie* case plus proof of pretext, but introduction of additional evidence of discrimination.

The Second Circuit's standard admittedly conflicts with that of the Fourth, Fifth and Eleventh Circuits. In administering that standard below, much evidence was completely ignored, evidence which did create issues of fact. It is generally the opinion amongst the employment law bar in New York, as reflected in the New York Law Journal, that *Reeves* is virtually ignored by the Second Circuit, and that whether a summary judgment motion will be granted or denied generally depends upon which District Judge decides the issue. See the article from the New York Law Journal reprinted in our Appendix, *infra* at A16-A20, N.Y.L.J., July 5, 2001.

Thus, as explicated further *infra*, we urge that the petition be granted because the decision below is in conflict with the decisions of the Fourth, Fifth and Eleventh Circuits on the same important matter, and the Second Circuit has decided an important federal question in a way that conflicts with the relevant decision of this Court in *Reeves*, *supra*, and that by its selective use of evidence, - - precisely what this Court disapproved of in *Reeves*, - - it has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power. The Courts below have not only failed to consider all relevant evidence, but have also selectively relied upon self-serving declarations of the employer - - while ignoring the deposition testimony of representatives of the employer, and varying salient facts.

Petitioner brought this action contending discrimination by IBM Corp. on the basis of age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 (1) (b)-(d) and parallel provisions of New York State Law, N.Y. State Human Rights Law, N.Y. Exec. Law § 290 *et seq.* (A7).[1]

Respondent IBM moved for, and was granted, summary judgment on the basis of certain alleged facts as recited by the District Court, which relied virtually entirely upon allegations of fact in declarations of IBM personnel, ignored almost all of the evidence contrary to those statements, and ignored the deposition testimony of varying IBM representatives. To elucidate:

In 1995, the executives involved in the tax function at IBM numbered eight, four of whom were in their forties, and two of whom - - Petitioner Pilipshen and one Charnas - - were 52 and 53 years old respectively. The person in the tax department who was in charge of the advancement of others was one Mattson. According to Mattson, the two oldest executives in the tax function, Petitioner and Charnas, were demoted as part of a corporate retrenchment. Mattson testified at deposition that his selection of the two oldest employees for demotion was not at all based upon their performance records, but solely on the basis of their not being on the replacement table to replace the head of the department, though at no point whatsoever did Mattson ever explain why all the younger employees in the tax function were so eligible, even though Petitioner Pilipshen - - with 19 years of experience - - was not. The IBM executives testified at deposition that although such replacement tables are done every two years, if one was not on an executive

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[1] Such references are to the Appendix filed below in the Second Circuit.

replacement table, one could not be eligible for promotion.[2]

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[2] Thus, Mattson himself testified as follows, at A479-480:

> Q. If you are not on an executive replacement table you can't become an executive, right?
>
> ***
>
> Generally not, but you could become an executive because they are done every two years and something could happen in the intervening two years and you have not been on a replacement table and you become an executive.
>
> Q. If you are not on an executive replacement table generally you can't become an executive?
>
> ***
>
> A. Generally you did not. It's not that you can't. The word can't is wrong.

And at A627-628, IBM's Serkes testified as follows:

> Q. What did you understand about Mattson's explanation to mean, the reference to the replacement table and the executive resource plan inactive file?
>
> MR. GERBER [counsel for IBM]: You're talking about future - -
>
> Do you understand his question?
>
> THE WITNESS: Yes.
>
> A. Yeah, about future director jobs. Because I said maybe it would be appropriate to tell him this,

Mattson also testified that Petitioner Pilipshen's executive resource table, which would indicate when a non-executive was available for an executive position, was placed in an inactive file, which placement other IBM executives had never heard of. (A475-481, A677, A741, A777)

After Petitioner Pilipshen was so demoted, he was most embarrassed, and accordingly accepted a IBM position in Paris. Thereafter several positions for tax executives became available in 1998 and 1999. Tax director Cox (Petitioner's immediate manager) believed Petitioner to be qualified for all of them (A528-A532). Though at least one corporate executive, one Goulet,

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and he said, no, he's not on my replacement table, so it wouldn't be appropriate to tell him that.

Q And because he wasn't on the replacement table, he wasn't going to be a director?

A. For the time. People - - people move off and on these director tables all the time. I've taken people off and I've put people on. So at this time it would not have been appropriate.

And again, at A629 Serkes testified:

Q. So as long as he was off, he wasn't going to be considered, but if he got put back on, he would be considered?

A. That's right.

wanted to have Petitioner Pilipshen placed on her executive replacement table, Mattson told her, knowing that such statement was false, that Petitioner Pilipshen had contracted to work in Paris until the year 2000, falsely advising others that this made it inappropriate for Petitioner Pilipshen to be considered for the other executive positions. Accordingly, Petitioner was never even considered for the positions that became available in 1998 and 1999 - - even though he was qualified for all of them, except possibly for one position that was newly specially created to reward another.

In 1999, Petitioner filed the charge of discrimination with the Equal Employment Opportunity Commission, and thereafter commenced an action in the Southern District of New York.

Respondent IBM Corporation moved for summary judgment, which motion was heard and submitted on May 26, 2000. On June 13, 2000 - - one day after this Court's decision in *Reeves, supra* - - the District Court (Brieant, J.) granted IBM's motion for summary judgment.

Appeal was duly taken to the United States Court of Appeals for the Second Circuit, which on July 24, 2001 entered a summary order affirming the District Court's decision, "For substantially the reasons stated by Judge Brieant in his comprehensive Memorandum and Order dated June 13, 2000,***". No further explanation of the Second Circuit's decision was given.

At no point whatsoever had the District Court even mentioned the false statement of Mattson, used to effectively preclude Petitioner from even being considered for the positions that

opened up in 1998 and 1999, that Petitioner was unavailable for any promotion until the year 2000, and which Mattson knew to be a false statement. Except for one reference to Pilipshen's deposition testimony, the District Court resorted to virtually no deposition testimony of any sort, and instead relied (with that one single exception) upon statements made not in deposition, but in declarations of IBM's executives, though these statements were often at variance with their deposition testimony.

As the District Court wrote below (A2), Mattson, the head of the tax department, stated that the only person qualified to replace him in 1995 was another tax executive, Carney. This was the stated basis for demotion of the two most experienced executives, in their 50's, in favor of others, in their 40's.

The Courts below ignored that although Mattson had first testified to the above effect, at deposition, he had previously written that the reduced executive position had nothing to do with performance or achievements (A778), and that the demotion was not performance related. Mattson did testify at deposition that the decision was based solely on potential for his replacement table, - - and he then testified that the reason for this was a claimed lack of skills (A475). The replacement table is a list of people considered able to replace another person in that person's position, either presently or some time in the future - - and Mattson had the veto power over putting someone on the replacement table. The Respondent was unable to ever locate a copy of the replacement table that Mattson claimed he relied on in demoting the Petitioner in 1995.

The Courts below further ignored that Petitioner's performance had never prompted a negative rating, that another tax director had written in January 1995 that Petitioner Pilipshen was

"superb", as well as "the best technician", that his continued employment was "vital to IBM's defense against possible attacks on audit by non-U.S. Government authorities", who "has the respect of other members in the tax department". Nor did the Court consider that Petitioner's work had never fallen below the level of his tax director colleagues (A145).

Nor had the Court considered in this connection that Petitioner had performed well in his 13 years as a tax director, even according to Mattson (A400-1, A453), nor was there ever any explanation as why only the younger members of the tax team had more potential than Petitioner did as Mattson's replacement. Nor did the Courts consider that Mattson had admitted (A123-4) that in making his decision, he had taken the eligibility of tax directors for earlier retirement (at age 55) into account (A427-33), nor that he had previously asked both Petitioner and fellow Charnas their ages, then 53 and 54, which placed them closest to early retirement of all the tax directors. (A426-A437). Nor did the Court consider that fellow director Carney - - the only person Mattson thought qualified to replace him [Mattson] at that time, - - had conceded that other than himself, Petitioner had possessed the most international tax experience of any director in the department (A652-3).

The 1995 restructuring resulted in a provision for director of international tax, requiring an international tax director (A525). Though Mattson claimed that Petitioner's international tax director position had been reorganized and restructured by the start of 1995, he never endeavored to explain what this restructuring consisted of, or why he did not preserve Petitioner's directorship by keeping him in this essential position, and instead leaving it unoccupied (A311-12, A442, A526), appointing instead as director of international tax in 1996 one Cox, who had held but a single non-executive position deemed to be international in nature, and for only one year, working

under Petitioner (A312, A344, A507-9, A512-3, A515-A517, A745, A754). Though Cox had only one year's experience, in contrast to Petitioner's eight, she was 11 years younger than the Petitioner (A745). At no point did IBM ever offer any explanation as to why the relatively inexperienced Cox was appointed in preference to the experienced Petitioner.

At no point whatsoever did either of the Courts below mention that the jury might have been able to consider, in relation to Mattson, and Mattson's explanations - - the basis upon which IBM's defense here rested - -, that Mattson had made the false statement as to Petitioner's unavailability, nor did the Courts below consider, or even mention, that Mattson's credibility was further an issue for two additional reasons: (1) that Mattson and Carney had in the then recent past been unsuccessful defendants in a sexual harassment proceeding, which proceeding was supported by Petitioner (A95-9), and (2) that Serkes, IBM treasurer and supervisor of Mattson, had found him to be less than forthcoming in dealing with him to the point that over the last two years, he no longer trusted him, and finally fired him (A572, A588-A591, A646-A649) while fellow directors Cox and Goulet both had testified as to having reservations when it came to believing and trusting Mattson (A568-9, A729-A730), and the supposed replacement table on which Mattson had purportedly relied was neither found nor produced by IBM.

RETALIATION: IBM'S "OPEN DOOR" (GRIEVANCE PROCEDURE) SLAMS SHUT.

The District Court wrote that Petitioner had met with Mr. Serkes, the corporate treasurer, who was to investigate his complaint as part of IBM's so-called "open door" grievance

procedure. Though the District Court wrote (A943) that "*** Mr. Serkes met with Plaintiff, investigated his complaints and determined that there was no merit to Plaintiff's concerns" (A943), the Courts ignored that Serkes himself admitted that his so-called investigation did not in any way address the allegations of age discrimination (A602), that Serkes had ignored the issue once again after his meeting with Pilipshen, where Plaintiff had again raised the issue (A603-6), Mr. Serkes writing that "By some of Ken's new claims *** it looks as if he is gearing up for a fight (lawsuit ?). This is just another letter that had served to piss me off (again)." (A608-A613, A866). Thus, there was no investigation of Petitioner Pilipshen's claim that he was the victim of age discrimination.

The District Court thereafter noted that "Pilipshen's grievances were investigated by Al Wells, director of employee programs, who concluded that Petitioner had been treated fairly, and no age discrimination or retaliation had occurred." (A943). But the District Court ignored the admitted fact that Wells had never considered the age discrimination issue in ruling against Pilipshen (A867-A871). (Wells apparently excused his failure to investigate the age discrimination issue on the basis of a statement of one Zimmerman who quoted Petitioner as saying that he did not believe his demotion had occurred because of age. (A92)). But the Court ignored that the Petitioner had contradicted this, both in his testimony and in his E-mail to Zimmerman, in which he stated that "I believe the way Bob [Serkes] had handled my demotion is a violation of the US Anti-Discrimination Laws." (A259).

THE BERMAN INCIDENT

The District Court summed up this incident as follows:

> In the fall of 1996, Rick Thoman, Defendant's CFO, retained Walter Berman, an outside consultant, to evaluate the Tax Department's effectiveness. Berman Dep. 9. In December 1996, Mr. Berman met with the European tax group, including Plaintiff. Mr. Berman recommended that the Plaintiff be fired. Berman Dep. 23-24, 40-41. Plaintiff was not terminated, but received a low review on his annual evaluation for 1996. Based upon this review, Plaintiff was denied stock options in 1997.

This condemnation of Petitioner omitted the following facts, any and all of which would have created issues of fact for a jury, had a trial been held:

Berman's action was based on his claim that a presentation at one of these meetings was made jointly by one Pillai, IBM's European Treasurer and Petitioner (A194-8, A704-A710, A634), Berman claiming that after an allegedly poorly received presentation, Petitioner had admitted to disagreeing personally with Pillai's views on European tax, but nevertheless had felt compelled to go along with him, stands that Berman found to show a lack of integrity on Petitioner's part (A198-9, A710, A718). This appraisal was thus allegedly premised upon a presentation made by Petitioner which was described as disastrous and having left CFO Thoman aghast. But:

a. IBM could not point to any mention of this presentation being made anywhere in the 1996 appraisal allegedly premised upon it (A621-2, A633-5, A767-A774);

b. Petitioner had testified at deposition that his only presentation was one which had been reviewed and approved in advance by Mattson, which had proceeded without incident (A347, A349-A352, A355-A357);

c. Petitioner Pilipshen had testified at deposition that a presentation had been made by Pillai himself, the details of which he had not known until made (A345-8) and

d. Petitioner denied having had the meeting with Berman or having said the things that Berman attributed to him (A260, A358-A366, A368).

Additionally, the District Court ignored the facts that this evaluation had been made by Mattson (A494, A506, A581-2, A632, A635, A759-A774) and approved by Serkes - - who had earlier been "pissed off" by Pilipshen's request for investigation, that this was the only unsatisfactory rating Petitioner had ever received in the 20 preceding years or in the 3 following years, that as a general matter an unsatisfactory rating was an extremely rare occurrence for anyone (A415, A520-2, A553-4, A636-7, A656-8). Moreover, the District Court ignored that

e. Cox, who had become Petitioner's direct supervisor, had appraised Petitioner's performance positively (A525,A560-2), and his ratings from fellow employees with whom he had worked closely, called 360's, were all positive - - these were from Pillai, Germany's head of tax, Johann Spengler, and

director of treasury operations for Southern Europe Delesgues (A634, A639-A642, A505-6, A523-4, A875-A878), and

f. Serkes indeed admitted that he had never encountered a situation when the 360's were all positive and the employee had nevertheless received an unsatisfactory rating (A638).[3]

ADDITIONAL EVIDENCE OF AGE DISCRIMINATION NOWHERE REFERRED TO BELOW:

In 1998, Petitioner's superior Cox refused to recommend him (or the other oldest director, Charnas), for stock options, which were being used as a means of retaining employees, because both men, admittedly "being core and very vital to the department,", lacked "long term potential to contribute," and, as such, "from a longevity point of view,", Cox declined to recommend them (A880, A881). And indeed, tax manager McLoughlin was denied stock options one year because, at age 52, he was viewed as being at the end of his career (A742).

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[3] The District Court apparently deflected any consideration of these other matters, all of which created issues of fact, in its Footnote 1 on page A943, where the Court said that "While Plaintiff and Defendant disagree as to the level of interaction between Plaintiff and Mr. Berman, this is irrelevant to the determination of the legal issues presented." The Court nowheres explained why such conflicts of fact were irrelevant, while its recited facts about Mr. Berman's recommendation of being fired and getting a low review were relevant.

THE FILLING OF THREE TAX EXECUTIVE POSITIONS IN 1998 AND 1999.

Three tax executive positions became available in 1998 and 1999. They were all filled by younger men. The District Court wrote off Petitioner's claim of age discrimination in this regard, by reciting that "Plaintiff has offered of no evidence to contradict Defendant's claimed reasons for the promotions of Messrs. Cramer, Wallace and Chetrit." (A945), and went on to recite that (A946) that "Defendant has shown that the three individuals who were promoted were qualified for the promotions they received."(A946). The District Court, in so ruling, failed to consider the following:

a. Cramer, who was appointed director of tax intercompany (A882), had no tax background whatsoever - - he had been manager of intercompany relations (*Ibid.*) - - though Plaintiff had a rich background in the intercompany area at Defendant (A681, A683-A684, A690), and, of course, in the tax area. The position was created specially for Cramer.

b. Wallace - It was IBM's claim below that Wallace was hired because every incumbent employee was excluded from consideration for this position, and that by definition, Pilipshen was not eligible and therefore not qualified. But Carney, in his affidavit, had merely recited that the acting CFO had told him to seek outside candidates for two new positions, that he and Mr. Berman wanted to interject outside thinking into the executive ranks of the tax department, and were unsure that the inside directors who were in competition to succeed to Mr. Carney's job had what it would take to make the new tax focus work (A46). But there was nothing to exclude the non-directors who were not in competition to succeed

to the job, which was a category that Mr. Pilipshen was in, and therefore he was not barred from consideration. Were it not for the Mattson false edict that Mr. Pilipshen was not available until 2000, there was nothing to show that Petitioner might not have had what it would take to make the new tax focus work, and he might have been considered for this position. And Carney's affidavit was untrue and misleading, since the actual specifications for this position (A54-A55) did not restrict consideration to those not at IBM, and indeed Petitioner would have been eminently qualified under those specifications.

Tax director Cox admitted telling Petitioner that he had failed to receive this position because Petitioner "has either annoyed or irritated some people probably with his behavior,", "behavior" (the same term she used to describe Charnas' desire to challenge his performance appraisal) meaning "the manner in which he did the open door," and "some people", referring primarily to Serkes, who had been deeply involved in the selection of Wallace and who was admittedly angry at Petitioner's use of the open door (A549-50, A552-3, A558-9, A597, A866). Cox also attributed Petitioner's failure to even receive consideration for this position to Petitioner's being continuously excluded from the replacement tables and the lingering effects of the unsatisfactory 1996 appraisal (A382-3). Cox also admitted that "the manner and style" in which Petitioner pursued his open door would have been a negative consideration of management in the broader matter of whether the Petitioner would ever be returned to a director's position (A551-2).

c. Chetrit was promoted to a director's position despite the fact that he did not fill one of the prerequisites for the position, that it be filled by someone qualified "to compete for the # 1 [tax] job" within "2-3 years", for Carney, the head of the department, did not believe that Chetrit would be ready to do this.

(A89). Moreover, because of Mattson's misleading interdiction of Petitioner, because of his ban on Petitioner filling any other position until 2000, it was impossible for Pilipshen even to have been considered for this position.

THE FOCUS OF IBM GENERALLY UPON YOUNGER PERSONS IN FILLING THESE POSITIONS:

There had been testimony at deposition by both Carney and Cox that these three positions were filled with an eye towards finding potential replacements for Carney, who by then was the head of tax (A548, A651, A692). Carney claimed that Petitioner had not even been considered for any of these new positions because of an allegedly new approach to taxes, whereby tax directors had to possess legal, accounting and business experience. (A686-7). But a jury could have considered that Carney also conceded that Petitioner had the legal and accounting experience, even though Carney claimed that Petitioner had lacked the business experience. A jury could also consider that when asked to state the business experience of tax director George, Carney testified that George gained such experience during his time in Europe - - but this was while working the very same job that Petitioner had assumed from him in 1995, a job whose responsibilities had only increased during the time that Petitioner held it (A688-9, A696). Indeed, Carney admitted that tax director Cox's business experience had been accumulated as a tax counsel of Latin America, which Cox herself conceded was the very same experience gained by Petitioner and George in Europe (A690-1). We have already noted, *supra* p.9, that how close someone was to retirement age, etcetera, played a part in determining promotion.

ADDITIONAL EVIDENCE THAT MIGHT HAVE BEEN CONSIDERED BY A JURY:

After noting in the description of one candidate Tom Taylor's credentials that he was 52 years old (A892), IBM, in comparing Taylor to another candidate, Paul Grossman, found Grossman to be "younger more energetic" than Taylor (A893). IBM then offered one of these three positions to the younger and more energetic Grossman, who accepted and then backed out (A894). And in describing the qualifications of another candidate, Judy Zelesco, IBM made sure to note that she was about 47 yrs old (A895).

THE DECISION OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

Though the Second Circuit's stated standard of review in employment discrimination cases is to review *de novo* the District's Court decision, applying the same standards for summary judgment as obtained in the District Court [*Carlton v. Mystic Trans. Inc.*, 202 F. 3d 129, 133 (2d Cir. 2000)], the Second Circuit made no independent evaluation of the case from a summary judgment viewpoint, but in its summary order recited that:

> For substantially the reasons stated by Judge Brieant in his comprehensive Memorandum and Order dated June 13, 2000, the judgment is AFFIRMED.
> (App. C, pp. A14-A15)

REASONS FOR GRANTING THE WRIT

POINT I

THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE PROPER INTERPRETATION OF THIS COURT'S RULE IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000).

The Second Circuit itself is authority for the fact that there is a serious conflict between its decisions and those of other circuits in regard to the interpretation of *Reeves, supra.* Thus, in *Zimmermann v. Associates First Capital Corporation*, 251 F. 3d 376 (2d Cir. 2001), affirming a judgment after trial awarding the Plaintiff damages in a Title VII case, it wrote of this conflict as follows:

> Since Reeves, the case law has been developing as to what sort of a record will permit a plaintiff who presents evidence of a prima facie case and evidence of a pretext to have a jury consider the ultimate issue of discrimination and what sort of record will entitle a defendant to judgment as a matter of law. The Fifth Circuit appears to understand Reeves to mean that a prima facie case and evidence of pretext take a case to a jury in the absence of "unusual circumstances that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII." Blow v. City of San Antonio, 236 F. 3d 293, 298 (5th Cir. 2001) (emphasis added);

see also Evans v. City of Bishop, 238 F. 3d 586, 592 (5th Cir. 2000) (noting that the "Supreme Court in Reeves emphasized the importance of jury fact finding and reiterated that evidence of the prima facie case plus pretext may, and usually does, establish sufficient evidence for a jury to find discrimination.") (emphasis added). The Fourth Circuit has observed that if the plaintiff proves a prima facie case and pretext, her claim must go to a jury unless "there is evidence that precludes a finding of discrimination." Rowe v. Marley Co., 233 F. 3d 825, 830 (4th Cir. 2000).

Our Circuit has not read Reeves quite so favorably to Title VII plaintiffs. Without insisting on unusual circumstances or evidence precluding a finding of discrimination, as the Fourth and Fifth Circuits have done, we have simply ruled in several cases that a record that included evidence of a prima facie case and evidence permitting a finding of pretext did not suffice to permit a finding of discrimination. [Citations omitted]. The task, as outlined in these decisions, is to examine the entire record, and, in accordance with Reeves, make the case-specific assessment as to whether a finding of discrimination may reasonably be made. Slattery noted that "the Supreme Court has indicated that only occasionally will a prima facie case plus pretext fall short of the burden a plaintiff carries to reach a jury on the ultimate question of discrimination" but that "such occasions do exist." Slattery, 248 F. 3d at 94 (citing Reeves, 530 U.S. at 148).

Since the Second Circuit's decision in *Zimmermann*, *supra*, the Fifth Circuit, in no uncertain terms, has reiterated its position.[4]

Moreover, the Fourth and Fifth Circuits have been joined in their position by the Eleventh Circuit, in *Hinson v. Clinch County, Georgia Bd. of Educ.*, 231 F. 3d 821 (11th Cir. 2000), where, at 831, the Eleventh Circuit ruled that the District Court had "erred in requiring [Plaintiff] to show not only pretext but also additional evidence that the Board discriminated against her based on her sex."

There is thus a marked conflict between the Second Circuit on one hand, which still adheres to its old standard of pretext plus though disclaiming this, and the Fourth, Fifth and Eleventh Circuits on the other hand. It is undisputed in the case at bar that a *prima facie* case was established.[5] There was much evidence of pretext. In the Fourth, Fifth or Eleventh Circuits plaintiff would clearly have survived the summary judgment motion, granted to the employer here. There is thus a direct conflict in the circuits.

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[4] The Fifth Circuit, in *Ratliff v. City of Gainesville, Tex.*, 256 F. 3d 355, 361 (5th Cir. 2001), noted the sharp division between the "pretext plus" strand of analysis, which "*** requires a plaintiff not only to disprove an employer's proffered reasons for the discrimination, but also to introduce additional evidence of discrimination" and that, by contrast "the permissive pretext only" standard is a more lenient approach, where if the Plaintiff establishes that the defendant's reasons are pretextual, the trier of fact is permitted, but not required, to enter judgment for the Plaintiff. The Fifth Circuit adhered to the permissive pretext only standard.

[5] As the District Court noted, IBM so conceded. App. A at A5.

Indeed, the very evidence recited by the District Court, whose opinion was adopted by the Second Circuit, recites enough evidence of pretext so that, even without more, the case could well have gone to the jury. But, as we have noted in our Statement of Facts, there was a tremendous amount of other evidence of pretext that the Courts below simply never alluded to. (See *supra* pp. 8-16).

A recent article in the Brandeis Law Journal, noting even more inconsistencies between and within the varying circuits than we have pointed to, sounds a clarion call for Supreme Court review of this now murky area. In "THE AFTERMATH OF *ST. MARY'S HONOR CENTER V. HICKS* AND *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*: A CALL FOR CLARIFICATION", 39 Brandeis Law Journal 747 (2001), the author concludes as follows (*Id* at 771-772):

> No matter what test, framework, interpretation, or analysis that results from *Hicks* and *Reeves*, one thing is clear: a call for clarification is in order. It is both appropriate and necessary for the Supreme Court to review and revise its holding in *Hicks* and *Reeves* in order to hand down a steady, clear and workable framework so that the circuits may be consistent in their analysis of employment discrimination lawsuits. The world of employment discrimination is murky and subjective in its own nature because it deals with individual bias expressed in the employment context. Normally an employer will not overtly discriminate. Rather, discrimination usually will take a deceptive and ambiguous form, leaving an employee plaintiff with little direct evidence as to demonstrate the wrongs committed against her. Consequently, the framework to be applied to this volatile

> subject matter should not further "muddy the waters," but clarify the subject matter so that plaintiffs, defendants, and courts can clearly see their roles and burdens.

And the author of that article has not even touched upon the confusion within the Second Circuit itself. See *supra* p. 3.

We submit that, whatever the appropriate rule to be applied may be, the Courts in the case at bar acted erroneously in granting summary judgment. But from the viewpoint of the reasons why certiorari should be granted, or rather by considering the criteria for granting certiorari, it would seem clear that there is a sufficient conflict between and within the varying circuits to warrant clarification by this Court of these issues. They are of vital importance.

A. <u>The situation in the Second Circuit is anarchic, it being recognized by the legal community within the Second Circuit that the determination of summary judgment motions generally depends upon which District Judge a case may be assigned to.</u>

We have annexed as Appendix C hereto an article in the New York Law Journal, which, incidentally, notes the Second Circuit's decision in *Zimmermann* and its conflict with that of other circuits. The article notes that even though this Court believed in *Reeves* that it was overruling the prior decisions of the Second Circuit, which it felt were antithetical to *Reeves*, the Second Circuit has gone on to insist that its rule in the very case which this Court expressly overruled [*Fisher v. Vassar College*, 114 F. 3d. 1332 (2d Cir. 1997)], is nonetheless the rule of law that still obtains. It would seem that the Second Circuit has departed from the usual course of judicial proceedings in such a way as to call for the intervention of this Court.

B. The overlooking of crucial evidence going to the credibility and good faith of the Defendant in a Title VII case, and granting a motion for summary judgment in favor of the employer, represents a pronounced departure from judicial standards.

Of course, in writing a judicial opinion, a Court must pick and choose which facts it will rely upon as mandating the outcome which the Court pronounces. However, in the case at bar, the District Court, and by its affirmance the Second Circuit, have ignored crucial evidence going to the *bona fides*, the motivation of the employer, which, in effect go to the very guts of the issues before the Court on a summary judgment motion. In *Reeves*, this Court saw fit to reverse when only one element of the Petitioner's case had been ignored - - while here, virtually every element of the Petitioner's case has been ignored. Perhaps the only case in which an employee has been successful since *Reeves* in the Second Circuit was in *Zimmermann*, *supra*, where the Defendant had destroyed every single record, on the Plaintiff and on her performance.[6] Apart from such a damning circumstance, we have so far been unable to find any record on which the Second Circuit reversed the finding of summary judgment for an employer, or reversed any relief granted to a defendant after trial.

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[6] In the case at bar, the employer was never able to produce the replacement table that allegedly motivated the employee's demotion.

C. The case at bar may be the only opportunity this Court will have to finally rule as to whether the Second Circuit approach is the correct one, or whether the approach of the Fourth, Fifth and Eleventh Circuits is correct, in view of particular litigation difficulties in Title VII cases.

What seems astonishing, at first blush, is that there seem to be no cases in which certiorari has been sought, post-*Reeves*, to review a decision adverse to the employee. But a reflection on the problems of an employee, who has lost out in the courts below, would indicate that this may be the only case in which this Court would be able to review the conflict between the circuits on this issue, for this reason:

It needs no citation to show that litigation is enormously expensive. The employee who believes that she or he was the victim of discrimination goes through not only the administrative procedures mandated by the statutes, but also the district courts' analysis, with the case going up to a U.S. Court of Appeals. The expense of this three stage litigation is enormous. Few, indeed, are there who can afford it. After having spent enormous amounts for litigation, the average former employee - - usually then jobless - - would be at the end of his or her financial resources, and the attorney willing to take such a case up to this Court on a contingency basis would be non-existent. In the case at bar, it is a former executive, still employed, who has the wherewithal to address this Court. This Court might not have such an opportunity again for a long time.

POINT II

THIS COURT SHOULD CONSIDER WHETHER IBM'S USE OF EXECUTIVE REPLACEMENT TABLES AND THE LIKE, AT LEAST WHEN COMBINED WITH ITS OBSESSION WITH AGE, IS ITSELF A VIOLATION OF TITLE VII.

Requiring the listing on an executive replacement table as a prerequisite to corporate advancement tends to insure that older persons are likely to be excluded from promotion, as here, because of their closeness to retirement age. While the use of replacement tables and executive resource plans on its face is non-discriminatory, the way that these tools are used, as construed and applied by IBM, makes them invidiously, if not inherently, discriminatory because of age. Thus, in determining the eligibility for the executive resource table and/or the replacement table, we have seen that IBM takes into account the closeness of the individual to the (non-compulsory) retirement age of 55, the proposed longevity of the employee (an interesting euphemism for age itself), and also makes inquiry about the employee's age. There can be little doubt but that, in the extremely sophisticated world of one of the world's greatest, if not the greatest, corporations, the use of these otherwise facially neutral devices necessarily leads to, if it is not the direct product of, a subtle method of exercising age discrimination. Since the retirement age of 55 provides an option to an employee to retire at 55, rather than being a requirement of retirement at age 55, the very consideration of closeness to retirement age becomes a virtual substitute for saying that age is a factor in determining promotion.

POINT III

THIS COURT SHOULD CONSIDER WHETHER THE SHIFTING BURDENS OF PRODUCTION AND PROOF IN TITLE VII CASES SHOULD BE APPLICABLE TO SUMMARY JUDGMENT MOTIONS.

In *Reeves* this Court did not consider, because the parties did not dispute the issue, whether the shifting burdens of production and proof enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) were applicable to summary judgment cases, but assumed they were. We urge - - as we urged below - - that they should not be, which would help avoid the thicket of problems that arises when a rule designed for trial is applied to a motion for summary judgment, thus requiring an order of proof which is totally unrealistic in a summary judgment situation.

The rule of *McDonnell Douglas* was designed to insure fairness to a mostly helpless, if not hapless, Plaintiff who would have difficulty in overcoming subtle instances of discrimination. But, at least as utilized in the Second Circuit in summary judgment cases, it has become an all but invulnerable shield for the employer, requiring proof of a *prima facie* case, proof of pretext, and proof of something more - - with the "plus" being nowheres clearly defined. It has become a new rule of law, applicable only to Title VII cases.

For it always been elementary law school law - - Civil Procedure I - - that a *prima facie* case is one that entitles a Plaintiff to go to the jury. See virtually any edition of Black's Law Dictionary. But the net result of *McDonnell Douglas*, as applied to Title VII cases (at least in the Second Circuit), when its standards are not used to govern an order of proof, is to deny a jury trial to one who has a *prima facie* case. For the Title VII Plaintiff in a summary judgment situation is the only Plaintiff

who must not only prove a *prima facie* case to get before the jury, but must prove as well that the defense is pretextual, in the Fourth, Fifth and Eleventh Circuits, plus something even more in the Second Circuit. The evolution of this rule has turned a sword for the employee into a shield for the employer, an unfortunate and unforeseen result. It should be corrected.

CONCLUSION

This Court should grant certiorari, reverse the decision below, and order that the matter be set down for trial.

Respectfully submitted,

HERBERT MONTE LEVY
Attorney for Petitioner

Dated: New York, New York
October 18, 2001

APPENDIX

APPENDIX A

MEMORANDUM & ORDER OF HON. CHARLES L. BRIEANT, DATED JUNE 13, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KENNETH PILIPSHEN,

Plaintiff,

-against-

IBM CORPORATION,

Defendant.

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MEMORANDUM & ORDER

99 Civ. 3674 (CLB)

Brieant, J.

By motion filed on April 18, 2000, heard and fully submitted on May 26, 2000 defendant IBM Corporation moves pursuant to Rule 56, Fed. R. Civ. P., for summary judgment in this employment discrimination case based on age under the Age Discrimination in Employment Act, 29 U.S.C. § 626(1)(b), (c), (d), and New York State Human Rights Law, N.Y. Exec. Law § 290 et seq. Plaintiff filed opposition papers on May 15, 2000. Defendant filed reply papers on May 22, 2000.

Plaintiff Kenneth Pilipshen was employed by defendant IBM Corporation in its Tax Department in 1976. Plaintiff was appointed as Director of Tax Planning and Research in 1982, Director of Taxes International in 1986, and Director of International Tax Programs and Customs in 1990.

In 1993, IBM undertook a company wide reduction in its workforce. As a part of this reduction, Defendant terminated twenty individuals from the approximately one hundred person Tax Department. Mattson Dec. ¶3. Jerry York, IMB's Chief Financial Officer directed all department heads to reduce the number of directors throughout the department. Mr. York initially instructed the Tax Department to terminate three executives. Mattson Dec.¶3. Bob Mattson, the head of the Tax Department, negotiated a modification to the reduction, under which, instead of terminating three executives, he would reassign two directors to non-executive positions. Mattson Dec. ¶4-5.

At the time the decision had to be made, there were eight executives in the Tax Department: Mr. Mattson, the Assistant Treasurer of Tax, age 57, Gary Carney, the Director of Tax Operations, age 56, Howard Charnas, age 53, Earlene Cox, age 42, Philip George, age 44, Louis Feeney, age 47, Jeanne Goulet, age 46, and Plaintiff, age 52. The final decision of which directors to demote was made by Mattson and Carney. Mr. Mattson determined that Feeney and Goulet were essential to their assignments and could not be replaced. Mr. Mattson also decided that Ms. Cox and Mr. George had skill which gave them potential eventually to replace Mr. Mattson as head of the department. Mattson Dec ¶6. Finally, Mr. Mattson determined that neither Plaintiff or Mr. Charnas would be able to succeed Mr. Mattson, and that the only person qualified to replace Mattson at that time was Mr. Carney. Mattson Dep. 180-81.

On January 1, 1995, Plaintiff and Mr. Charnas, were changed to the position of Tax Counsel. This position held the same salary as Plaintiff's previous position, but was a non-executive position. Plaintiff classifies this as a demotion, while Defendant claims it was a reorganization. In June 1995, Plaintiff was appointed to the Tax Counsel position in the Europe-Middle East-Africa Region, which is based in Paris, France, and was reclassified as a non-director position.

Because this position was reclassified as a non-director level, Plaintiff spoke with Jeff Serkes, the Corporate Treasurer, who was Mr. Mattson's superior, as an initial step in the internal grievance procedure. In November 1995, Mr. Serkes met with Plaintiff, investigated his complaints and determined that there was no merit to Plaintiff's concerns. Serkes Dec. ¶7-8. On January 21, 1996, Plaintiff used Defendant's "Open Door Policy" to complain to Defendant's Chairman, Mr. Lou Gerstner regarding his removal from an executive position. Pilipshen's grievances were investigated by Al Wells, Director of Employee Programs, who concluded that Plaintiff had been treated fairly, and no age discrimination or retaliation had occurred.

In the fall of 1996, Rick Thoman, Defendant's CFO, retained Walter Berman, an outside consultant, to evaluate the Tax Department's effectiveness. Berman Dep. 9. In December 1996, Mr. Berman met with the European tax group, including Plaintiff.[1] Mr. Berman recommended that Plaintiff be fired. Berman Dep. 23-24, 40-41. Plaintiff was not terminated, but received a low review on his annual evaluation for 1996. Based upon this review,

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[1] While Plaintiff and Defendant disagree as to the level of interaction between Plaintiff and Mr. Berman, this is irrelevant to the determination of the legal issues presented.

Plaintiff was denied stock options in 1997.

In January 1998, Mr. Mattson retired, and Mr. Carney, then age 59, succeeded him. Mr. Carney became responsible for all subsequent promotions in the Tax Department. In 1998, a Tax Director position became available and was given to Mr. Paul Cramer, an employee younger than Plaintiff. In September 1998, Defendant hired a man younger than Plaintiff, Mr. Michael Wallace, to fill an open Tax Director position. Plaintiff alleges he was told by his supervisor that he was denied this promotion because of the poor review he had received in the 1996 evaluation. The position, however, was not offered to any individuals already employed by Defendant.

In January 1999, Defendant assigned Plaintiff additional duties relating to European Tax work. Plaintiffs title was not changed. In February 1999, Plaintiff sought the position of IBM Credit Corp. Director, but Defendant gave the position to Mr. Chetrit, a younger employee. Plaintiff alleges that Ms. Cox told him that this promotion was denied because the manner in which he used the open door annoyed Serkes. Cox. Tr. 108-9, 115-16, 126-27.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 14, 1999. Plaintiff commenced the present action seeking double back pay including other benefits he would have enjoyed had he not been denied promotion. Plaintiff also seeks compensation for future pecuniary loss, emotional pain and suffering, and other non-pecuniary losses. Under New York Human Rights Law, Plaintiff seeks additionally $500,000 for pain and suffering and emotional distress.

DISCUSSION

The standards for granting summary judgment in this Circuit are so well known as to obviate the need for citation. We note, however, that all facts must be viewed in the light most favorable to the non-moving party.

ADEA

Defendant does not contest that Plaintiff has shown a prima facie case of age discrimination. However, under the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), an ADEA Plaintiff must ultimately show that Defendant's proffered reasons are false and a pretext for age discrimination. *Levin v. Analysis & Technology, Inc.*, 960 F.2d 314, 317 (2d Cir. 1992). Plaintiff need not show that age was the only factor, but must show that it was a determinative factor. *Id.* Plaintiff can only prevail if on the totality of the evidence, viewed in the light most favorable to Plaintiff, a reasonable jury could infer that the employer's true reason was the alleged discrimination. *McCarthy v. New York City Technical College*, 202 F.3d 161, 166 (2d Cir. 2000).

Failure to Promote Because of Age

Plaintiff has offered no evidence to contradict Defendant's claimed reasons promotions of Messrs. Cramer, Wallace and Chetrit.[2] An employer may promote younger employees instead of

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[2] That Plaintiff did not apply specifically for these positions is not relevant as Plaintiff informed his supervisors of his interest in being promoted and the specific promotions were not

older employees based on the younger employees; qualification without violating age discrimination laws. *Mauro v. Southern New England Telecomm., Inc.*, 208 F.3d 384, 387 (2d Cir. 2000). Defendant has shown that the three individuals who were promoted were qualified for the promotions they received. Mr. Cramer received a promotion within his position based upon his business qualifications, and because he had held that position for twenty years. Mr. Cramer's position was made a director's position as a reward for this service. Mr. Wallace was not promoted, but was hired from outside of Defendant because of his skills and experience as head of taxes at Tandem Computers. No individuals already employed by Defendant were considered for this position, and Plaintiff could not have received a promotion to the position. Mr. Chetrit received his promotion based upon his "hands-on" experience with the Business Optimization Project ("BOP"). Plaintiff had minimal experience with the BOP and the head of the BOP task force thought that Plaintiff did not add anything to the Project. Carney Dec.¶20. Further, Mr. Chetrit had business experience which Defendant believed would be useful in the new position.

The fact that the three individuals who were promoted were slightly younger than Plaintiff is insufficient as a matter of law to carry the Plaintiff's burden of showing pretext. *Fagan v. New York State Elec. & Gas Corp.*, 186 F3d 127, 134 (2d Cir. 1999); See *O'Conner v. Consolidated Coin Caterers Corp*, 517 U.S. 308, 313 (1996) (the inference of discrimination "cannot be drawn from the replacement of one worker with another worker insignificantly younger."). Mr. Cramer, for example, was only two years younger than Plaintiff at the time of his promotion. Further, all but two of the current Tax Directors are over the age of fifty, and

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posted or advertised. *Mauro v. Southern New England Telecomm., Inc.*, 208 F.3d 384, 387 (2d Cir. 2000).

the remaining two are in their late forties. As Plaintiff cannot establish that the three individuals were not uniquely qualified for the positions they received, and cannot show that Defendant's reasons for not promoting Plaintiff to these positions were pretextual and false, Plaintiff cannot succeed on his age discrimination claims relating to failure to promote, and therefore granting summary judgment is proper.

Retaliation

Plaintiff's retaliation claims are governed by the same burden-shifting *McDonnell Douglas* test as Plaintiff's age discrimination claims. Plaintiff has the ultimate burden of proving that a retaliatory motive is the true motive for the conduct complained of. *Tonka v. Seller Corp*, 66 F.3d 1295, 1308 (2d Cir. 1995). To establish a claim of retaliation, Plaintiff must be able to prove that (1) he was engaged in protected activity; (2) the employer was aware of the activity; (3) Plaintiff suffered an adverse employment decision; and (4) that there was a causal connection between the protected activity and the adverse employment action. Plaintiff claims that both his poor evaluation for 1996 [3] and his denial of the promotion given to Mr. Chetrit were motivated by retaliation. Defendant concedes that Plaintiff has satisfied the first and third requirements, but claims that Plaintiff has failed to show the requisite knowledge or causal connection to establish a claim.

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[3] While Plaintiff's federal claim relating to the evaluation would be time barred, it would still be timely under New York State Human Rights Law, and the Court will address the claim on the merits.

The review which Plaintiff challenges as retaliatory was prepared by Messrs. Mattson and Serkes, who knew of the Open Door appeal. The fact that the review was based partially upon the information provided by Berman, who did not have such knowledge, is probably not significant. The final review was by individuals who did have knowledge, which satisfies the second requirement. The second requirement is also satisfied in relation to Mr. Chetrit's promotion. Both Mr. Carney and Mr. Serkes who made the promotion decision were aware of the Open Door appeal.

Plaintiff, however, cannot establish a causal connection between his protected activity and the poor review. Plaintiff completed his open door appeal in March 1996. The poor review was given in January 1997, and Mr. Chetrit was not promoted until 1999. The time between the protected activity and the alleged retaliation is too great to support the inference of causation. *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85-86 (2d Cir. 1990).[4]

The review was generated only after Mr. Berman, an outside consultant, met with Plaintiff on several occasions in Paris. The record shows that Mr. Berman formed a negative opinion of Plaintiff's work and suggested he be terminated or removed from his position. Pilipshen Dep. 293, 302-305, 317-21. It was only after this occurrence that Plaintiff received a poor review. The record shows that Plaintiff received a good review on his 1995 evaluation, which occurred after Plaintiff spoke with Mr. Serkes and commenced his Open Door appeal.

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[4] That Plaintiff was working in Europe and was not in day-to-day contact with Mr. Mattson does not extend the time in which such an inference of discrimination is to be drawn.

The record also shows that Plaintiff received stock options in subsequent years. Further, Messrs. Mattson and Serkes argued against Plaintiff's termination, and simply gave Plaintiff a poor review. There is no evidence that the review was based upon the Open Door appeal and not Defendant's proffered reason, namely the opinions and recommendations of Mr. Berman.

Ms. Cox's alleged statement in 1998, that Plaintiff was denied the promotion given to Mr. Chetrit because of his open door appeal does not establish that Defendant was motivated by retaliation. Ms. Cox was not involved in the evaluation of Plaintiff or the promotion decisions and does not have any personal knowledge of the factors that were used to make the decision. Additionally, as Mr. Carney did not submit Plaintiff's name to Mr. Serkes as an option for the promotion, Mr. Serkes could not have granted or denied the position to Plaintiff, and Mr. Serkes' opinions regarding the open door policy would have been irrelevant. Further, Ms. Cox stated that it was the method by which Plaintiff proceeded with the open door complaint after Serkes had agreed to investigate it, and not the complaint in itself, that may have annoyed Mr. Serkes. Cox. Tr. at 109.

Plaintiff's Demotion

In order to preserve the right to bring a lawsuit for discriminatory demotion, a plaintiff must file a charge with the EEOC within 300 days of the discriminatory action. *Lightfoot v. Union Carbide Corp*, 110 F.3d 898, 907 (2d Cir. 1997). The timeliness of this filing is measured from the date Plaintiff had notice of the discriminatory action. *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708,713 (2d Cir. 1996). Plaintiff's demotion occurred in 1995, more than 300 days before he filed his complaint with the

EEOC in April 1999.[5] However, a Plaintiffs time to file is extended if Plaintiff can show a continuing violation. *Id.* The continuing violation doctrine applies when the plaintiff can show an ongoing discriminatory policy or practice, a "systemic violation," or where the employer allows specific and related instances of discrimination to continue unremedied for so long as to amount to a discriminatory practice, a "serial violation." *Cornwall v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994) The continuing violation doctrine extends the commencement of the time to file until the last discriminatory act in furtherance of the practice. *Id.*

Plaintiff cannot establish a systemic violation. Plaintiff claims that his removal from the replacement table caused him to not be considered for a return to executive status. Plaintiff claims that he failed to receive promotion in 1998, because of his removal from the replacement table. This claim does not constitute a systemic violation. The continuing violation exception does not apply when there is no evidence that the challenged policy had a discriminatory motive. *Harris v. City of New York*, 186 F.3d 243, 249 (2d Cir. 1999). Enforcing a facially neutral rule is not a discriminatory practice. *Gomes v. Avco Corp.*, 964 F.2d 1330, 1333 (2d Cir. 1992). Plaintiff has provided no evidence that the replaccment tables have a discriminatory motive. At time of Plaintiffs demotion, Mr. Carney, the only individual on Mr. Mattson's replacement tables was over thc age of fifty. Mattson Dep. 180-81. Plaintiffs evidence that Mr. Mattson purposely kept him off of the replacement tables does not taint the otherwise facially neutral tables with a discriminatory motive. In any event, both Mr. Serkes and Mr. Carney, who made the promotion decisions, have stated that individuals were not excluded from consideration for promotion

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[5] Plaintiff also filed his complaint beyond the three-year statutory period under the New York State Human Rights Law.

merely because of their absence from the replacement tables. Serkes Dep. 108, Carney Dep 30-31,134-137, Carney Dec. ¶21-22. In fact, both Mr. Cramer and Mr. Chetrit received promotions when they were not on the replacement table. Pilipshen Dep. 580-81. Mr. Charnas, the other individual demoted with Plaintiff, is in line for the Director of Taxes, Hardware, position, despite not being on the replacement table for the head of taxes position. Carney Dep. at 45. Even assuming that Plaintiffs removal from the replacement tables caused his failure to be promoted, this is insufficient to prove a continuing violation. The fact that a claimant continues to feel the effects of the time barred discriminatory act during the statutory period does not create a systemic violation. *Fagan,* 186 F.3d at 134.

Similarly, Plaintiff cannot establish a serial violation. A serial violation occurs when a number of discriminatory acts emanate from the same discriminatory animus. *Jensen v. Frank,* 912 F.2d 517, 522 (2d Cir. 1990). Here the alleged discriminatory acts were performed by different decision makers, and stemmed from two alleged prohibited reasons, retaliation and/or age. The two separate reasons do not combine to constitute a serial violation: *See generally, Lloyd v. WABC-TV*, 879 F.Supp. 394 (S.D.N.Y. 1995) (Duffy, J.). In order to establish a serial violation, Plaintiff must provide evidence of closely related discriminatory actions. *Van Zant*, 80 F.3d at 713. A demotion is not closely related to the promotion of another individual to the same or similar position. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir. 1997). Ms. Cox' promotion to a position similar to Plaintiffs prior director position two years after he was demoted from the position does not establish a serial violation. Plaintiff cannot establish that any of the allegedly discriminatory actions were closely related to his demotion. Plaintiff cannot establish a continuing violation as a matter of law, and as such his claims relating to the demotion are time barred.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is granted. The Clerk shall file a final judgement.

SO ORDERED

Dated: White Plains, New York
June 13, 2000

/s/

Charles L. Brieant, U.S.D.J.

APPENDIX B

JUDGMENT OF HON. CHARLES L. BRIEANT, DATED JUNE 15, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

KENNETH PILIPSHEN,

Plaintiff,

-against-

IBM CORPORATION,

Defendant.

----------x

JUDGMENT 99 Civ. 3674 (CLB)

Whereas the above entitled action having been assigned to the Honorable Charles L. Brieant, U.S.D.J., and the Court thereafter on June 13, 2000, having handed down its Memorandum & Order granting Defendant's motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED:
That the complaint be and is hereby dismissed.

Dated: White Plains, New York
June 15, 2000

/s/

James M. Parkison, Clerk

APPENDIX C

SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JULY 24, 2001

00-7916
July 24, 2001.
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------x

KENNETH PILIPSHEN,

Plaintiff-Appellant,

-against-

IBM CORPORATION,

Defendant-Respondent.

----------x

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*.)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Plaintiff-appellant Kenneth Pilipshen timely appeals from a judgment entered on June 15, 2001 ("the judgment") that granted the motion for summary judgment of defendant-appellee IBM Corporation ("IBM") and dismissed his complaint. Pilipshen's complaint alleged that IBM had discriminated against him on the basis of age in violation of the

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(1)(b)-(d) and parallel provisions of New York State law.

For substantially the reasons stated by Judge Brieant in his comprehensive Memorandum and Order dated June 13, 2000, the judgment is AFFIRMED.

For the Court,
Roseann B. MacKechnie, Clerk

/s/

By : Lucille Carr

APPENDIX D

TAMARA LOOMIS'S ARTICLE "EMPLOYMENT BIAS *AFTER 'REEVES,' LITTLE HAS CHANGED IN THE CIRCUIT*, FROM NEW YORK LAW JOURNAL, DATED JULY 5, 2001

A YEAR HAS passed since the U.S. Supreme Court decided *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133 (2000), which set the standard for determining when an employment bias case can go forward.

Back then, plaintiffs' employment lawyers could scarcely contain their glee, predicting that Reeves would up the ante considerably for defendants moving for summary judgment in the Second Circuit. "We were all dancing on the tables," said plaintiffs' lawyer Anne Golden, of Outten & Golden LLP.

Today, management lawyers are dancing. The case, which was expected to pack a real punch, has barely made a dent.

"Reports of the death of summary judgment in the Second Circuit have been greatly exaggerated," said Theodore Rogers Jr., head of the labor and employment law group at Sullivan & Cromwell. Sounding a common theme among management lawyers, Mr. Rogers said that when it came to litigating employment discrimination cases, it was business as usual.

Business as usual means seeking dismissal on summary judgment in every case unless you know the facts are seriously in dispute, said Ronald M. Green, a management lawyer with Epstein, Becker & Green.

So what happened? Plaintiffs' lawyers will tell you that the U.S. Court of Appeals for the Second Circuit basically thumbed its nose at the Supreme Court. Management lawyers say that, to the contrary, the circuit court correctly interpreted a decision that overly optimistic plaintiffs' lawyers initially misread.

Whatever spin one puts on the Second Circuit's actions, one thing is clear. In the course of several post-Reeves decisions, it reconciled the higher court's decision with a controversial Second Circuit case, *Fisher v. Vassar College*, 114 F.3d 1332 (1997), which many observers thought Reeves implicitly overruled. And in doing so, the appellate court sent the message that its position on summary judgment "is fairly favorable" to defendants, Mr. Rogers said.

'Fisher' Stays Good Law

The Reeves decision rejected a standard of proof for employment discrimination known as "pretext plus," which required plaintiffs opposing a summary judgment motion to show not only that the employer's reason for taking an adverse employment action was false, but also that the real reason was discriminatory.

The Supreme Court listed the Second Circuit among those circuits requiring "pretext plus," citing the Fisher case. When the justices rejected the "pretext plus" standard, many observers assume that Fisher had been abrogated.

But the Second Circuit took issue with the higher court's characterization of Fisher. In a case last year called *Schnabel v. Abramson*, 232 F.3d 83, it ruled that to the contrary, Fisher did not require "pretext plus" in every case like the other circuits did, and thus remained good law.

Then, in a second ruling late last year, it laid to rest any further doubts on the issue. In *James v. New York Racing Ass'n*, 233 F.3d 149, the Second Circuit concluded that "the Supreme Court's reasoning in Reeves is wholly compatible and harmonious with our reasoning in Fisher."

Case-by-Case Analysis

The result has been to throw employment discrimination cases back into the gray area of a factually based, case-by-case analysis, which management lawyers say is exactly where they belong anyway.

"All the Second Circuit is saying is that at some point in the analysis you've got to create an issue of material fact with respect to whether the adverse employment action was motivated by discriminatory animus," said Gary D. Friedman, a partner at the New York office of Mayer, Brown & Platt.

He added that prudent plaintiffs try to put forth such evidence anyway. "For a plaintiff to believe that showing merely that an employer lied is fool's gold," he said.

Legal analysis aside, from a practical standpoint, lawyers on both sides of the table agreed that Reeves has had absolutely no discernible impact in the Second Circuit on the chances of getting summary judgment.

"I have not seen any significant or even detectable shifts in this circuit," Ms. Golden said.

They attribute the cause of this rather remarkable state of affairs largely to the independent streak many Second Circuit judges exhibit at both the district and appellate court levels.

"The Second Circuit is an enigma," said Mr. Green. "Here it's as much the judge as anything that determines whether you'll get summary judgment."

For example, in the Southern District, he said, defendants stood little chance of getting summary judgment on a race discrimination claim before Judge Constance Baker Motley or Judge Robert L. Carter, who are black. Similarly, Judge Morris E. Lasker almost never dismisses gender-based claims on summary judgment, Mr. Green said.

On the other end of the spectrum, according to plaintiffs' lawyer Jeffrey M. Bernbach is Judge John S. Martin Jr., who is one of the toughest judges on employment discrimination cases.

"It's the luck of the draw," Mr. Bernbach said, adding that judges in the Second Circuit "do their own thing."

Many lawyers also consider the appellate court to be something of a crap shoot. "If you know who is on your panel, you have a good insight into how they will rule," Ms. Golden said. A panel typically comprises three of the 11 appellate court judges.

She said the court is still split on the issue of "pretext plus," as exemplified by the bewildering array of opinions in the Fisher case, a 6-5 in banc decision. "There is a great deal of tension about what Reeves means," Ms. Golden said.

Not only is the Second Circuit internally divided, but it also stands out as an iconoclast among the circuit courts. Ms. Golden recalled a speaker at this year's annual National Employment Lawyers Association in Seattle saying that post-Reeves, things had changed for the better for plaintiffs "except in the Second Circuit," and distinguishing it from the "normal circuits." "It was kind of

embarrassing," Ms. Golden said.

'Rogue' Status

The U.S. Court of Appeals itself has acknowledged its "rogue" status. In *Zimmermann v. Associates First Capital Corp.*, no. 00-9155, 2001 U.S. App. LEXIS 11292 (May31, 2001), it noted that it "has not read Reeves quite so favorably to Title VII plaintiffs" as other circuits.

Despite the divergence both within and without the circuit, lawyers did not expect the issue of "pretext plus" to go back to the Supreme Court anytime soon, although Ms. Golden predicted that, "sooner or later, we will probably see another in banc on this."

For now, though, in the Second Circuit, Reeves is "just another case," Mr. Green said.

APPENDIX E

STATUTES INVOLVED

29 U.S.C. Sec. 626.

Record-keeping, investigation, and enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

New York State Human Rights Law
Section 296(1)(a)
Unlawful Discrimination Practices

It shall be an unlawful discriminatory practice for an employer or licensing agency, because of age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Supreme Court, U.S.
FILED
MAY 20 2002

No. 01-1551

IN THE

Supreme Court of the United States

KENNETH PILIPSHEN,

Petitioner,

v.

IBM CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT IBM CORPORATION'S BRIEF IN OPPOSITION TO KENNETH PILIPSHEN'S PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 01-1551

KENNETH PILIPSHEN,

Petitioner,

v.

IBM CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT IBM CORPORATION'S BRIEF IN OPPOSITION TO KENNETH PILIPSHEN'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petition seeks review of an unpublished, non-precedent-setting summary order issued by the Second Circuit affirming a decision of the United States District Court for the Southern District of New York. The District Court granted a summary judgment motion dismissing, with prejudice, the complaint of Petitioner Kenneth Pilipshen ("Petitioner" or "Pilipshen").

Pilipshen, an employee of Respondent IBM Corporation ("IBM"), filed suit in May, 1999, alleging that he had been demoted in 1995, retaliated against (by being passed over for an award of stock options) in 1997, and passed over for

promotion to certain executive-band jobs in 1998 and 1999, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 620, *et seq.*, and the New York Human Rights Law, N.Y. Exec. L. §§ 290, *et seq.* ("NYSHRL").

In a thorough opinion issued on June 13, 2000, the United States District Court (Brieant, J.) held: (1) the 1995 demotion claim was time-barred under both the ADEA and the NYSHRL; (2) the 1997 retaliation claim was time-barred under the ADEA and without merit as a state law claim; and (3) the 1998 and 1999 failure-to-promote claims were without merit because Petitioner had failed to proffer sufficient evidence to establish pretext or improper conduct by IBM. While Petitioner has claimed here and in the Court of Appeals that the decision below does not adhere to *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), a case decided the day before the District Court ruled, he did not ask the District Court to reconsider before he appealed. Indeed, as discussed at pp. 7-10 *infra*, given the District Court's findings regarding Petitioner's failure to raise a legitimate issue regarding pretext, *Reeves* is inapplicable to this case.

On July 24, 2001, the Second Circuit affirmed the grant of summary judgment, adopting as its reasons those stated by the District Court. This summary disposition underscores that there are no compelling reasons why this case, which was resolved by the application of well-settled legal principles to undisputed facts, is worthy of this Court's attention.

Clarification Of The Record

The factual recitation set forth in the Petition does not correctly or concisely state the relevant, material facts, which are not genuinely disputed.

Pilipshen is currently employed by IBM as a tax attorney, and he has been for over twenty-five years. From 1986 to

1995, he held various positions in the Tax Department, mostly in the international tax area, that were classified as executive, with the title of "Director." At the time that Pilipshen was a "Director," the Tax Department had six other persons holding the title of "Director," all of whom were then members of the ADEA's protected class.

During 1994, IBM's uppermost management directed the Tax Department to reduce the number of "Director" executive positions as part of a company-wide reduction in costs and manpower. Pilipshen was one of two Directors in the Tax Department whose job was reclassified, from the executive "Director" position to a non-executive "Tax Counsel" position, while retaining the same salary and nearly all of the same benefits. This is the purported demotion about which he complains.

A few months after the so-called demotion, in June 1995, Pilipshen was transferred to Paris, where he stayed until June 2000. This was a coveted position in the Tax Department and one that Pilipshen actively sought. In late 1995 Pilipshen pursued a complaint about his "demotion" through IBM's internal grievance system (known as the "Open Door"), without success. In early 1996, he consulted a lawyer about the possibility of bringing a lawsuit, but he did not do so until more than three years later, after the statute of limitations had run.

In December 1996 Pilipshen's performance in Europe was criticized by IBM's Chief Financial Officer ("CFO") and an outside consultant, Walter Berman, who was advising IBM on tax-related business strategy. As a result, the CFO and Mr. Berman wanted to have him fired. Pilipshen's management team intervened and saved his job, one condition being that his performance rating for the calendar year 1996 (conferred in January 1997) was lowered. The lower performance rating ultimately disqualified Pilipshen for a discretionary

stock option award in March 1997. This lost award is the alleged act of retaliation about which he complains.

Mr. Berman's initiative, known as the Business Optimization Project ("BOP"), involved a company-wide, worldwide review of many aspects of the company's business, including tax strategies. As a result of the BOP review, the then-head of the Tax Department, Gary Carney, reorganized the Tax Department during 1998, expanding the number of director-level executive positions to seven.[1] The four incumbent directors received their assignments, leaving three positions—the Directors of Taxes for Intercompany Relations, Global Services, and Global Financing—to fill. These are the lost opportunities for promotion about which Pilipshen complains.

From the outset, it was a foregone conclusion that the newly created position of Director of Taxes, Intercompany Relations (formerly a business function that was moved into the Tax Department) was going to be filled by Paul Cramer, the incumbent in the non-executive position that was upgraded to create the new directorship. The promotion rewarded Mr. Cramer for his years of stellar performance in the specialized function of intercompany pricing (the setting of prices at which different subsidiaries of IBM buy and sell items between each other). IBM also wanted to provide him with an incentive to remain with the company, even though he had become eligible to retire at full pension. Mr. Cramer is only three years younger than Pilipshen and has nine years more service to IBM.

---

[1] From 1995 through 1997 the number of Director positions in the Tax Department remained constant at four, and there was no turnover in the personnel who filled those positions. At the beginning of 1998, Robert Mattson, the head of the Tax Department who made the "demotion" decision in 1995, retired. He was replaced by Mr. Carney, who had been the second-in-command of the department. Both Mr. Mattson and Mr. Carney are older than Pilipshen.

It also was IBM's initial plan to fill both of the remaining two Director positions with external candidates—persons from outside of IBM, as a way of injecting different perspectives into the Tax Department. A formal search effort was undertaken by a consulting firm to find and screen appropriate senior-level candidates. This process disqualified *every* incumbent IBM employee, regardless of age. As a result of this search, IBM hired Michael Wallace, the former head of the Tax Department at Tandem Computers, in September 1998. He became the Director of Taxes, Global Services.

The external search process, however, was unsuccessful in finding a candidate to fill the third position, so IBM looked at qualified internal candidates. In March 1999, Juda Chetrit was selected to be the Director of Taxes, Global Financing, a position that directly supported IBM's financing subsidiary, IBM Credit Corporation. Mr. Chetrit's prior work, which included an active role in the BOP, was highly regarded, and he had prior relevant business experience, both at IBM and from his prior employment at companies comparable to IBM.

Pilipshen had not been under consideration as a candidate for any of the directorships filled in 1998 or 1999. For the first two positions filled, he shared this fate with every other IBM employee, save incumbent Mr. Cramer. For the last position filled, Pilipshen was not a logical contender. He was regarded as an international tax specialist and his only remotely relevant experience involving IBM Credit was fifteen years earlier. Even then, there was negative feedback about Pilipshen from the businessperson supervising that 1984 project.

The Decisions Below

The District Court granted summary judgment on the promotion claims because Pilipshen had no evidence to discredit the bona fides of IBM's explanation for its promotion decisions. Petitioner's only real argument, both

here and below, is that IBM *should not* have used the criteria it did to make its employment decisions. The issue of pretext, however, is whether the defendant *did not* actually base its decisions on its stated reasons. Pilipshen's arguments, in this Court and the courts below, have contributed nothing to this crucial issue. While the District Court accepted that Pilipshen may have established a prima facie case on the promotion claims, it concluded that he did not make *any* showing of a pretext by IBM.

Additionally, the District Court rejected Pilipshen's "demotion" and retaliation claims as time-barred under federal law. (The "demotion" claim also was untimely under state law.) The District Court also considered the merits of the retaliation claim under state law and concluded that Pilipshen had failed to establish a prima facie case. The Court of Appeals affirmed, in a summary order.[2]

REASONS FOR DENYING THE PETITION

There are no compelling reasons for this Court to review this case. The decisions below involve the most routine application of the most basic principles of law. In short, this Petition concerns an unremarkable case which has no significance to anyone other than the parties. The District Court's opinion is unpublished. The summary order of the Court of Appeals was not officially reported[3] and is of no precedential value under the local rules of the Second Circuit. *See* 2d Cir. R. 0.23; *Crocco v. Xerox Corp.*, 137 F.3d 105,

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[2] Although the Petition accuses the Second Circuit of failing to exercise *de novo* review, the law of the Circuit establishes that a summary order, such as that entered below, "is issued after due consideration of the merits of the appeal, and the judgment entered determines, either explicitly or implicitly, all issues raised in the appeal." *Furman v. United States*, 720 F.2d 263, 266 (2d Cir. 1983). Petitioner's innuendo is an unwarranted and unsupportable attack on the court below.

[3] It is unofficially reported at 15 Fed. Appx. 20.

108 n.4 (2d Cir. 1998). The decisions below hold no sway over any future proceedings; this Court "cannot act as a court of simple error correction . . . ." *Overton v. Ohio*, 534 U.S. ___, 122 S. Ct. 389, 390 (2001) (Breyer, J., respecting denial of cert.); *accord Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). In essence, Petitioner is merely seeking yet another layer of appellate review of an adverse decision that denied his unsupported claims.

We will now address Petitioner's main argument points.

I. PETITIONER'S CASE DOES NOT RAISE ANY CERT WORTHY ISSUE CONCERNING THIS COURT'S DECISION IN *REEVES* (RESPONSE TO POINT I OF THE PETITION)

Petitioner's first point requests review on the ground that the Court of Appeals' decision represents an allegedly aberrant interpretation of this Court's recent decision in *Reeves*. The Petition should be denied because, even if Petitioner is correct that the Second Circuit is not properly applying *Reeves* in other cases (a contention we dispute [4]), that alleged "fault" did not contribute to the judgment against him in this case.

---

[4] Petitioner's assertion is that the Second Circuit's approach conflicts with the approaches taken by the Fourth, Fifth and Eleventh Circuits. Recent cases from those circuits, however, suggest that all four of the circuits follow the same approach. *See, e.g., Cleary v. Nationwide Mut. Ins. Co.*, 9 Fed. Appx. 1, 6-7 (4th Cir. 2001) (not officially reported); *Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000); *Price v. Federal Express Corp.*, 283 F.3d 715, 721 n.4 (5th Cir. 2002); *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 468-89 (5th Cir. 2002); *Montemayor v. City of San Antonio*, 276 F.3d 687, 693 (5th Cir. 2001); *Walker v. Prudential Prop. & Gas. Ins. Co.*, 286 F.3d 1270, 1276-77 (11th Cir. 2002); *Wascura v. City of South Miami*, 257 F.3d 1238, 1246-47 (11th Cir. 2001); *Chapman v. AI Transport*, 229 F.3d 1012, 1025-26 (11th Cir. 2000) (en banc).

As this Court knows, *Reeves* asked "whether a plaintiff's prima facie case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." 530 U.S. at 140. This question examines the final stage of the three-step burden-shifting framework for analyzing circumstantial evidence of discrimination allegations that was first set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The familiar three steps are: (1) plaintiff's establishment of a prima facie case; (2) defendant's articulation of a legitimate, nondiscriminatory reason for its employment action; and (3) plaintiff's attempt to prove that the stated reason is, in reality, a pretext for unlawful discrimination. The burden on a plaintiff of presenting a "prima facie case" in a discrimination case is "minimal." *See, e.g., Rose v. NYP Holdings, Inc.*, 257 F.3d 164, 168 (2d Cir. 2001). Once an employer articulates its reason for an employment action, the presumption initially raised by the prima facie case disappears and no longer has any force. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993). The sole remaining issue then is "discrimination *vel non*." *Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

Importantly, "*Reeves* did not alter or amend the plaintiff's prima facie case." *Bryant v. Bell Atlantic Maryland*, ___ F.3d ___, No. 01-1541, 2002 WL 753435, at *7 (4th Cir. Apr. 29, 2002). Moreover, "*Reeves* in no way relaxed the requirement that plaintiffs make a showing that the defendant's proffered explanations were pretextual." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 470 (2d Cir.), *cert. denied*, No. 01-278, 122 S. Ct. 460 (2001). The significance of *Reeves* lies in its re-affirmation of the principle that, in many instances, a jury may infer "discrimination *vel non*" from the establishment of the prima facie case *and* a finding that the employer articulated a pretextual reason for its actions. In those

instances, the facts allow the jury to reasonably conclude that the employer lied to conceal an illegal motive. *Reeves* also acknowledges that the facts of the particular case may foreclose or negate any inference of an illegal motive in such circumstances. 530 U.S. at 148-49.

Reeves has no application to the issues that resolved this case. Obviously, Petitioner's time-barred federal law claims for "demotion" and retaliation are not affected. Likewise, the disposition of the state law claim for retaliation, which was dismissed on the ground that Petitioner failed to establish all of the elements of a prima facie case, is unaffected. And, the dismissal of the promotion claims also is not called into question, because the District Court concluded, on the basis of the undisputed facts, that Petitioner failed to show that IBM's stated reasons for the promotions at issue were false or pretextual. The disposition of a case on that basis does not implicate the holding of *Reeves*. *See, e.g., Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 n.9 (9th Cir. 2002) ("Because [plaintiff] has not shown that [defendant's] reasons are pretextual, she does not even reach the final stage of adjudication contemplated by *Reeves*."); *Rowe v. Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000) ("*Reeves* does not assist [plaintiff] because he failed to demonstrate, with respect to any of his federal claims, that [his employer's] proffered nondiscriminatory reasons for discharging him were pretextual."); *Taylor v. QHG of Springfield, Inc.*, 218 F.3d 898, 900-01 (8th Cir. 2000) ("*Reeves* only helps [plaintiff] if she has produced sufficient evidence to reject the legitimate explanation. She has not, so *Reeves* does not mandate reversal."); *see also Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400, 403 n.3 (5th Cir. 2001) ("Nothing in *Reeves* . . . abrogates [the] requirement of substantial evidence to support a claim of pretext.").

Petitioner's effort to manufacture a conflict among the circuits merely masks an agenda that he knows renders this

case unworthy of review. His arguments here rely on the premise that courts below erred as a matter of fact in reviewing the evidence of alleged pretext.[5] He contends they "have ignored crucial evidence going to the very guts of the issues before the court on summary judgment." (Petition, p.24.) He dangles the alleged circuit split as bait to try to hook this Court, but he cannot prevail on his claims unless he convinces this Court to engage in a very fact-specific inquiry into the record. This Court, however, "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). It should "decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases." *Vasquez v. United States*, 454 U.S. 975, 977 (1981) (Stevens, J., respecting denial of cert.); *accord Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting). Because a decision on the issue purportedly framed by the Petition's first point will not change the outcome of Petitioner's case without such a fact-specific inquiry, review should be denied. *See Somerville v. United States*, 376 U.S. 909 (1964); *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

II. PETITIONER'S CONTENTIONS CONCERNING IBM'S USE OF EXECUTIVE REPLACEMENT TABLES DO NOT PRESENT ANY COHERENT ISSUE FOR REVIEW (RESPONSE TO POINT II OF THE PETITION)

Petitioner's second point for review is, to say the least, confusing. He does not state what the issue is or explain what he would have the Court decide. The subject matter of

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[5] We do not think it appropriate to dignify with a response Petitioner's outrageous contention that the District Courts within the Second Circuit, home to some of the most distinguished jurists in the federal system, are in "anarchy" or otherwise unable to decide discrimination cases fairly.

executive replacement tables was a straw man argument constructed by Petitioner in the courts below in an attempt to try to interject alleged "age" issues into the business decisions surrounding the 1995 demotion. IBM never claimed to deny any promotional opportunity to Petitioner based on such tables and he never identified any evidence suggesting that it did. Significantly, since the 1995 demotion claim was dismissed as time-barred, there is no reason to review any aspect of the bona fides of that decision. Moreover, as the District Court noted, the "replacement table" at issue in 1995 was the one for the head of the Tax Department and the only person on that "table" was Mr. Carney, who is older (and has longer service with IBM) than Petitioner, and who actually got the job in 1998.

This point was apparently given little thought by Petitioner, as seen in his reference to Title VII, rather than the ADEA. Additionally, there is no discussion of *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in which this Court explained the distinction between decisions made based on age and those based on factors such as length of service (longevity) that merely correlate with age. Whatever can be made of Petitioner's argument, it appears to be foreclosed by *Biggins*.

III. PETITIONER HAS OFFERED NO REASON FOR THIS COURT TO RECONSIDER THE USE OF THE *McDONNELL-DOUGLAS* BURDEN SHIFTING FRAMEWORK IN THE SUMMARY JUDGMENT CONTEXT (RESPONSE TO POINT III OF THE PETITION)

Petitioner's final ground for review contends that this Court should abandon the use of *McDonnell Douglas* framework in evaluating summary judgment motions. This issue was not directly raised in the District Court and was

raised only in a footnote in the court of appeals. The abandonment of such a long-standing principle of law surely deserves greater airing in the courts below.

Moreover, Petitioner advocates jettisoning the *McDonnell Douglas* framework in favor of sending to a jury every case in which the plaintiff establishes a prima facie case. In so advocating, he exhibits no recognition of the particular use to which the phrase "prima facie case" is put in Title VII and ADEA jurisprudence. The phrase has two very different meanings. It can denote "[t]he establishment of a legally required rebuttable presumption," Black's Law Dictionary 1209 (7th ed. 1999), or it "may be used by the courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981) (citation omitted). Petitioner's argument is erroneously premised on the second definition. "*McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." *Id.*

Even without this error, the Petition has little to commend by way of reasons to bar the use of *McDonnell Douglas* in deciding summary judgment motions. The framework was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). Indeed, several of the judges of the United States District Court for the Southern District of New York, including the judge who heard this case, have often cut through the formalities of *McDonnell Douglas* to engage in a more pragmatic evaluation of the overall case, when appropriate. *E.g., Minton v. Lenox Hill Hosp.*, 160 F. Supp. 2d 687, 693-94 (S.D.N.Y. 2001); *Peterson v. City College*, 32 F. Supp. 2d 675, 683-84

(S.D.N.Y. 1999); *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 488 (S.D.N.Y. 1998); *Jalad v. Columbia Univ.*, 4 F. Supp. 2d 224, 234 (S.D.N.Y. 1998).

In the present case, the District Court knew it was not bound to rigidly apply the *McDonnell Douglas* framework but did so because it provided a sensible and orderly way to organize and evaluate the evidence. Petitioner's suggestion to review this case for the purpose of abandoning this useful tool—simply because the outcome displeased him—should be rejected.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-1551

IN THE
Supreme Court of the United States

OCTOBER TERM, 2001

KENNETH PILIPSHEN,

Petitioner,

-v.-

IBM CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF RESPONDING TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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7 pgs

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RULES

Rule 15.2, U.S. Sup. Ct. 1

1. Without explanation, IBM repeatedly alleges that the claims of Petitioner are "time-barred" (*e.g.*, pp. 6, 9, 11). However, IBM nowhere denies that, as set forth at pp.6- 7 of our Petition, Mr. Mattson[1] had made the knowingly false statement that Petitioner Pilipshen had contracted to work in Paris until the year 2000, falsely advising others that this made it inappropriate for Petitioner Pilipshen to be even considered for the other executive positions that became available in 1998 and 1999, thus preventing Petitioner Pilipshen from being considered for the positions available in 1998 and 1999. Thus, Petitioner's filing of a charge of discrimination in May, 1999 (IBM's Brief, p. 1) could not possibly have been time- barred.

In the case at bar, there is no problem of factual conflict to be sorted through to ascertain the truth: at no point whatsoever has IBM claimed that any of our factual recitations are false, thus waiving any such contention under this Court's Rule 15.2. Insofar as statements are made by IBM which are inconsistent with our recitals, they are demonstrably incorrect.[2]

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[1] Under the heading "Clarification of the Record" (p. 2), IBM recites that Mr. Mattson retired at the beginning of 1998, without any record citation. But Mr. Mattson had not retired - - he had been fired, as being untrustworthy. (A572, A588-A591, A646-9).

[2] IBM claims that the position in Paris was much coveted and desired by Petitioner. IBM ignores that Petitioner testified at deposition that he wanted the position in Paris only because he "didn't want to remain in the U.S. with the humiliation associated with being downleveled" (A152), and that he had "had no interest prior to *** my demotion" in the Paris position (A153). There is nothing in the Record to the contrary.

All that the Court need examine on an appeal is whether there were issues of fact sufficient to withstand summary judgment, and we submit that IBM has completely failed to show an absence of such issues.

2. Of course, as IBM argues (p. 10), this Court does not grant certiorari to review evidence and discuss specific facts. But in the case at bar, as in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the crucial facts were totally ignored in the determination below. While IBM argues that the case below was unreported and thus of no significance, part of its very significance lies in the fact that *Reeves* can be ignored and made worthless by simply ignoring the very basic facts of a case, made even more unpalatable by the fact that the decision is unreported and thus apparently relegates the case to obscurity. But the controversial use of unpublished opinions should not be a reason for failing to grant certiorari.[3]

3. In footnote 4 on page 7, IBM asserts that the Circuits whose approach we claim differ from the Second Circuit approach do not, in fact, so differ. However, a reading of the cases recited does not support IBM's conclusion.

4. In footnote 5 on page 10, IBM writes that it does not think it appropriate to dignify with a response what IBM terms

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[3] The supposed insignificance of "unreported" cases is belied by the fact that the federal unreported cases are indeed reported - - not only in Lexis and in WestLaw, but in a new publication called Federal Appendix. Indeed, IBM relies, in its very first citation in its string citation in its Footnote 4 on page 7, upon such a case, giving the Federal Appendix citation thereof. Non-publication of an "unpublished" opinion is thus now a complete fiction.

our "outrageous contention"that the Second Circuit District Courts are in "anarchy" or otherwise unable to decide discrimination cases fairly.

In making the argument that the situation in the Second Circuit is anarchic, we noted that it was "recognized by the legal community within the Second Circuit that the determination of summary judgment motions generally depends upon which District Judge the case may be assigned to" (Petition, p. 23).

We relied, in making what IBM calls that outrageous statement, upon an article in the New York Law Journal, reprinted at pp. A16-A20 of our Petition. That article noted that both management and employee lawyers attributed the lack of impact of *Reeves* "*** largely to the independent streak many Second Circuit judges exhibit at both the district and appellate court levels." (*Id.* at A18).

That article went on to quote attorney "Ronald M. Green, a management lawyer with Epstein, Becker & Green"(*Id.* at A16) as saying that "the Second Circuit is an enigma.", that "Here it's as much the judge as anything that determines whether you will get summary judgment" [in an employment discrimination case]. (*Id.* at A19). Ronald M. Green, the attorney who made the statement, is the Green who is a named partner in the law firm of Epstein, Becker & Green - - which appears for IBM here.[4]

Thus, it is IBM's counsel himself who made the statement that IBM now considers outrageous.

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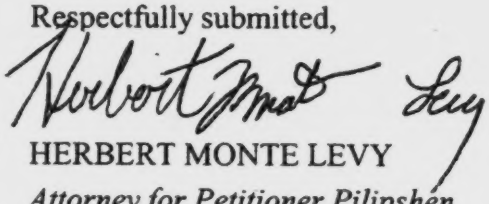
[3] That Mr. Green is the name partner in Epstein, Becker & Green appears from Martindale-Hubbell Law Directory 2001, at pp. NYC 428B-NYC 429B.

IBM counsel here is thus authority for the existence of a situation in the Second Circuit, which should be remedied through the grant of certiorari here.

CONCLUSION

This court should grant certiorari, reverse the decision below, and order that the matter be set down for trial.

Respectfully submitted,



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Dated: June 3, 2002